Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JUAN SANDOVAL AND SIDNEY PENNIX,
Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 29, 2009

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QUESTION PRESENTED FOR REVIEW

When reservists on active military duty must endure extreme hardship in order to take a promotional examination for their civilian police careers, did the Court of Appeals err in holding that section 4311 of USERRA (38 USC 4301 *et seq.*) does not require any accommodation but instead only so-called equal treatment?

LIST OF PARTIES

Plaintiffs / Appellants / Petitioners:

Chicago Police Officers Juan Sandoval and Sidney Pennix who also serve as officers in the United States Army Reserve.

Defendant / Appellant:

City of Chicago, Illinois.

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CITATIONS OF THE OPINIONS ENTERED IN THIS CASE

Opinion of the United States District Court for the Northern District of Illinois:

Sandoval et al. v. City of Chicago, 2008 WL 2743750 (N.D. Ill. June 13, 2008) (Apx. 1a-7a)

Opinion of the United States Court of Appeals for the Seventh Circuit:

Sandoval et al. v. City of Chicago, 560 F.3d 703 (7th Cir. 2009) (Apx. 8a-28a)

STATEMENT OF THE BASIS OF JURISDICTION

Federal jurisdiction in the District Court was based on 38 USC § 4323 and 28 USC § 1367. Sandoval and Pennix filed claims for relief under the Uniformed Services Employment and Reemployment Right Act ("USERRA"), 38 USC § 4301 *et seq*. and under applicable Illinois law, the Illinois Service Member's Employment Tenure Act ("ISMETA"), 330 ILCS § 60/1 *et seq*.

Jurisdiction before the United States Court of the Appeals for the Seventh Circuit was based on 28 USC § 1291 because the District Court's June 13, 2008 Order and Opinion granting the defendant's motion for summary judgment is final and appealable.

On March 30, 2009, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's June 13, 2008 Order granting the defendant's

motion for summary judgment. Jurisdiction for this Petition for Writ of Certiorari is based on 28 USC § 1254.

THE FEDERAL STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Uniformed Services Employment and Reemployment Right Act ("USERRA"), 38 USC § 4301 *et seq*. – specifically, section 4311(a) requires the following:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

20 CFR § 1002.193(b) states as follows:

> If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment

> before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position, and the nature and responsibilities of the service member while serving in the uniformed service.

STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

This case was filed on May 21, 2007. Sandoval and Pennix, Chicago Police Officers, alleged that the City violated federal and state law by denying them accommodations and benefits in their employment because Sandoval and Pennix are service members in the United States Army who were called to serve. Sandoval and Pennix alleged, *inter alia*, that the City violated USERRA by denying them a reasonable opportunity to take required promotional examinations. Specifically, Sandoval and Pennix allege that the City improperly required both Sandoval and Pennix to leave their military posts during wartime and travel through hostile territory at great personal danger in order to sit for Chicago Police Department's 2006 Sergeant promotional examination.

After extensive discovery and motion practice, the City moved for summary judgment. The District Court – while conceding that the issue of reasonableness for

administering a promotional examination in an alternate location involves disputed issues of fact – held that Sandoval and Pennix had failed to carry their initial burden of demonstrating that the City's unreasonable accommodation for the written qualifying test was motivated by their military service. *See Sandoval v. City of Chicago*, 2008 WL 2743750 (N.D. Ill. June 13, 2008) (Apx. 8a-28a). Sandoval and Pennix appealed the District Court's Order to the United States Court of Appeals for the Seventh Circuit. There the Court of Appeals held as follows:

> Sandoval and Pennix rely on *38 U.S.C. § 4311(a)*, which provides that a person serving in the military may not be "denied ... any benefit of employment ... on the basis of that" service. Plaintiffs say that they incurred higher costs, and more risk, to take their tests than did persons not serving with military units; they maintain that they would have scored higher had the tests been more convenient. The problem with this view is that § 4311 is an anti-discrimination rule -- its caption reads "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited". Sandoval and Pennix were not turned away because they were on active duty; to the contrary, Chicago arranged for each to take the test outside the United States. Section 4311(a) requires Chicago to treat persons on military service the same as other employees, which it did. If plaintiffs had been on vacation, or on leave to attend college abroad, they would have been treated exactly as they were. So where is the discrimination?

> What Sandoval and Pennix want is not the same treatment as everyone else (an anti-discrimination norm), but *better* treatment than those who are attending college or otherwise outside Chicago when a test is offered. In other words, they seek an accommodation rather than equal treatment. But § 4311 does not require accommodation, which is fundamentally different from an equal-treatment norm. See *University of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

See 560 F.3d at 704-705 (Apx. 3a-4a).

Sandoval and Pennix respectfully submit that the Court of Appeals erred in so holding. USERRA does require accommodation – indeed, providing services members an accommodation is the fundamental thrust of the legislation and other federal courts and federal regulations have so held. Moreover, contrary to the Court of Appeal's factual assertions in the excerpt above – which the City of Chicago attempted to correct following the issuance of the Court's March 30, 2009 Opinion (see defendant's counsel's March 31, 2009 letter to Judge Easterbrook, Apx. 29a-30a) – there was no evidence whatsoever that police officers on leave of absence for reasons other than military service were allowed an opportunity to take a promotional examination overseas. As a result, the facts demonstrate – as the defendant implicitly concedes – that the City provided an "accommodation" to satisfy its obligations under USERRA; Sandoval and Pennix allege that such accommodation was not reasonable.

These plaintiffs should have the opportunity to present their evidence at trial.

That evidence is important.[1] Sandoval and Pennix are Chicago Police Department officers who deserve to be promoted to Sergeant. Sergeant promotions occur when the CPD determines there is an operational need and when there are budgeted vacancies. On January 10, 2006, the City announced the 2006 police sergeant examination. The examination consisted of three components: (1) a written qualifying test; (2) an assessment exercise; and (3) a merit selection process. Sandoval and Pennix were among 5,452 police officers who applied to take the 2006 sergeant examination. The City has not offered another Sergeant promotional examination since March 2006.

The written qualifying test was administered to all applicants on the same day, March 25, 2006. No reschedules were permitted for the test. The accounting firm, Ernst & Young, is under contract with the City of Chicago to administer the test. On the test date, Sandoval was on military leave of absence in El Salvador. Sandoval was permitted only to take the test at the Ernst & Young office in San Salvador, El Salvador, which was the closest Ernst & Young office to the military base where Sandoval was stationed.

Pennix also submitted a written request to take the 2006 sergeant examination overseas because he was on active duty in Baghdad. The City permitted Pennix

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[1] The following facts are taken from the District Court's June 13, 2008 Opinion, *Sandoval v. City of Chicago*, 2008 WL 2743750 (N.D. Ill. June 13, 2008) (Apx. 8a-28a).

to take the test at the Ernst & Young office in Frankfurt, Germany, which was the closest office to the Baghdad military base where he was stationed. Both Sandoval and Pennix had to endure extreme hardships – including putting their lives at risk to cross hostile military zones – in order to appear at the location the City required for their March 2006 promotional examination. Sandoval and Pennix respectfully submit that the City has failed to fulfill its obligations under USERRA by requiring these military officers to endure such hardships in order to take a promotional examination.

ARGUMENT

This Petition for Writ of Certiorari should be granted because the Court of Appeals for the Seventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Indeed, with the nation at war and with the number of reservists and other military personnel growing, the need to clarify and resolve employers' obligations under USERRA – including those of the City of Chicago – is essential. Moreover, the Court of Appeals in this case has issued an opinion that conflicts with other federal courts and with federal regulations. For these reasons, this Petition should be granted.

Officers Sandoval and Pennix respectfully submit that the Court of Appeals erred by affirming the District Court's Order granting the City of Chicago's motion for summary judgment and thereby denying these officers their day in court. The Court of Appeals held that requiring Sandoval and Pennix – who in March 2006 were on active duty in El Salvador and

Baghdad, respectively – to travel across hostile territory putting themselves and their comrades at risk so that these service members could sit for a required promotional examination passes muster under USERRA because the City supposedly did not discriminate. Judge Easterbrook, writing for the Court, evens asks rhetorically, "So where is the discrimination?"

If Sandoval and Pennix could have answered that rhetorical question, they would have stated that it is inherently discriminatory to require service members – who are serving on active duty when a rare promotional opportunity becomes available in their civilian careers – to risk their lives to pursue promotion when those not serving in the military would never have had to endure such risks. The Court of Appeals ignores the very heart and purpose of USERRA which, as set forth in section 4301(a) is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; . . . and to prohibit discrimination against persons because of their service in the uniformed services." *See* 38 USC § 4301(a). Indeed, Judge Easterbrook and the Court of Appeals suggest that USERRA requires no different treatment for service members who serve our nation in wartime than those City employees who are on "vacation or on leave to attend college." *See* 560 F.3d at 704 (Apx. 3a). Judge Easterbrook and the Court of Appeals apparently refuse to acknowledge that Congress passed USERRA specifically to protect service personnel. For reasons which should be obvious, vacationers and college students do not enjoy such protection.

Stated simply, in its March 30, 2009 Opinion, the Court of Appeals has entirely missed the point of USERRA. Indeed, even the District Court in this case recognized the broad purposes of USERRA and ruled in the City's favor on different grounds. *See, e.g.*, 2008 WL 2743750 at n. 1 ("Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries. *McGuire v. United Parcel Service*, 152 F.3d 673, 676 (7th Cir. 1998).") (Apx. 16a, n. 1). But the Court of Appeals closes its eyes to the discrimination that is implicit in requiring service members to leave their posts and travel through war zones in order to fulfill a required civilian promotional requirement.

Even a previous decision from the Court of Appeals for the Seventh Circuit recognizes such inherent discrimination. In *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002), the Seventh Circuit affirmed the entry of summary judgment when Indiana firefighters complained about the amount of paid leave provided by the City of Indianapolis. The Court of Appeals held that the firefighters had no claim under USERRA because the litigants' military status provided only benefits not burdens. *See* 281 F.3d at 652. While recognizing that the firefighters did not demonstrate an adverse disparate impact as a result of their military statues, the Court of Appeals stated as follows:

> A disparate impact is the result of practices which on their face are neutral in their treatment of different groups but which in fact fall more harshly on one group than another. At some future time it may become necessary for

> us to decide whether a disparate impact claim can be prosecuted under USERRA. . . .But whether a disparate impact claim can be prosecuted under USERRA will wait for another day. This case fails on the facts.

See id. at 651.

Sandoval and Pennix respectfully submit that that day is here. These soldiers have adduced sufficient evidence of the starkly disparate burdens imposed on Chicago police officers who actively serve their country in the military compared with non-service member police officers who can sit for the required promotional tests and training programs at home in Chicago. The City claims that its policies apply to everyone – presumably implying that if a police officer (who is not a service member) were traveling overseas when a promotional test was given might be able to sit for the test in Frankfort, San Salvador or any other city where Ernst & Young maintains an office. But that is absurd – only police officers who, as service members called to fight our nation's battles around the globe, will routinely and predictably be far away and focused on more pressing matters when any promotional test is given. The City's conduct is precisely the kind of disparate impact case that is described in *Miller v. City of Indianapolis*.

If Sandoval and Pennix – and any other soldiers in their predicament, including those who could not or would not leave Baghdad to get to Frankfort to take the promotional test – must prove that the City of Chicago is maliciously intent on hurting soldiers in order to prove their claims, then it is unlikely that USERRA provides any relief to these soldiers. But the

adverse disparate impact borne by Sandoval and Pennix (as well any other soldier in Baghdad or other places who still wishes to pursue promotion in the City's police department) is unmistakable. Pursuant to the logic articulated in *Miller v. City of Indianapolis*, Sandoval and Pennix respectfully submit that evidence of disparate impact is sufficient to sustain their claims under USERRA and this Petition should be granted to settle this important federal question.

Other federal courts support this reasoning. For instance, in *Fink v. City of New York*, 129 F. Supp. 2d 511, 518 (E.D.N.Y. 2001), the District Court held that "[w]here a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service." *Fink's* holding and logic squarely contradicts the Court of Appeals for the Seventh Circuit in the case at bar.

Even the Code of Federal Regulations for the Department of Labor, Veterans' Employment and Training Service, recognizes that USERRA requires accommodating military personnel in connection with required promotional examinations. For instance, 20 CFR § 1002.193(b) states as follows:

> If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for

> permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position, and the nature and responsibilities of the service member while serving in the uniformed service.

This excerpt demonstrates that the Code of Federal Regulations does not so narrowly limit the protections of USERRA as the Court of Appeals in this case holds. Indeed, according to the Seventh Circuit, an employer complies with USERRA so long as service members serving on active duty in a war zone are treated no differently than vacationers -- so long as the employer's policies are neutral. On the contrary, the Code recognizes that USERRA is intended to provide real protections to service members like Sandoval and Pennix.

This Court too had addressed the obligations and benefits at stake in protecting the civilian careers of returning veterans. In 1981, this Court addressed a predecessor statute to USERRA – the Vietnam Era Veterans' Readjustment Allowance Act – holding that this predecessor statute did not require the employer to make work-schedule accommodations for an employee-reservist that were not made for other

employees. *See Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981). (Such holding sounds very similar to the Court of Appeals decision in the instant case.) Nonetheless, Chief Justice Burger's dissent states:

> A reservist's absences for training result from obligations vital to our national defense that other employees have not assumed, and the primary purpose of the re-employment rights statutes is to protect reservists against disadvantages in employment caused by these obligations. Indeed, the essence of the statutory guarantees provided by Congress is that employers must give special treatment to the military absences of veterans and reservists. . . In substance, the Court embraces the Court of Appeals' holding that § 2021(b)(3) "merely requires that reservists be treated equally or neutrally with their fellow employees without military obligation." However, ***unless the statute is read as safeguarding reservists from the adverse effects of facially neutral rules, much of its practical significance is lost.***

See 452 U.S. at 572-73 (emphasis added). It is, of course, worth noting that USERRA succeeded the Vietnam era statute and the legislative history of USERRA "indicates that the act was designed to improve, rather than replace the VRRA." *See, e.g., Novak v. Mackintosh*, 919 F. Supp. 870, 877 (S.D. 1996) (*quoting* H.Rep. No. 103-65, 103rd Cong., 2nd Sess. 21 (1993)).

Sandoval and Pennix respectfully submit that the Court should grant their Petition for Writ of Certiorari

to address and settle this important federal question whether USERRA requires employers to provide some reasonable accommodation to service members rather than simply allowing employers to use facially neutral policies allegedly to treat service members no different than other employees. Relying on Chief Justice Burger's reasoning, Sandoval and Pennix submit that unless USERRA is read as safeguarding reservists from the adverse effects of facially neutral rules, much of its practical significance – as well as its fundamental spirit and purpose – will be lost.

CONCLUSION

For all the foregoing reasons, Petitioners Juan Sandoval and Sidney Pennix respectfully request that the Court grant their Petition for Writ of Certiorari.

Dated: June 29, 2009

Respectfully submitted,

JUAN SANDOVAL and SYDNEY PENNIX, Petitioners,

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APPENDIX

APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

No. 08-2699

[Filed March 30, 2009]

JUAN SANDOVAL and SIDNEY PENNIX,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ILLINOIS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 2835—**Suzanne B. Conlon**, *Judge*.

ARGUED FEBRUARY 23, 2009
DECIDED MARCH 30, 2009

Before EASTERBROOK, *Chief Judge*, and KANNE and EVANS, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Two of Chicago's police officers filed this suit under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–35. They want to be sergeants. This position requires a competitive examination, which all

candidates take simultaneously to curtail the risks of cheating. Chicago scheduled an exam for March 25, 2006. Juan Sandoval and Sidney Pennix then were on military duty—Sandoval in El Salvador and Pennix in Iraq. Both asked for an opportunity to take the test outside the United States. Ernst & Young administers Chicago's civil-service exams outside Chicago. Both Sandoval and Pennix were offered the opportunity to sit for the exam in Ernst & Young's closest offices (San Salvador for Sandoval, Frankfurt for Pennix). Both accepted this offer without protest; both passed and were placed in the eligibility list; and both filed suit as soon as the first person was promoted from that list.

Sandoval and Pennix contend that they would have done better, and been promoted earlier, had the tests been offered closer to the places where they were stationed. They say that Chicago should have arranged for the military to administer the exam on base. They also seek compensation for what they describe as the cost and danger of reaching San Salvador or Frankfurt from their military-duty stations. The district court granted summary judgment for Chicago, however, after concluding that Chicago did not discriminate against persons serving in the military. 2008 U.S. Dist. LEXIS 46521 (N.D. Ill. June 13, 2008).

Jurisdiction is the first question. Suits against private employers under the Uniformed Services Employment and Reemployment Rights Act may be filed in federal court, but suits against states must be filed in state court. Compare 38 U.S.C. §4323(b)(2) with (b)(3). We held in *Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999), that this means *only* state court: §4323(b) is designed to avoid problems under the eleventh amendment with federal suits against states.

See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). But §4323(i) defines "private employer" to include a subdivision of a state for the purpose of §4323. So the holding of *Velasquez* concerns only suits against states themselves. Chicago is a "political subdivision" of Illinois, and subject-matter jurisdiction is established.

Sandoval and Pennix rely on 38 U.S.C. §4311(a), which provides that a person serving in the military may not be "denied . . . any benefit of employment . . . on the basis of that" service. Plaintiffs say that they incurred higher costs, and more risk, to take their tests than did persons not serving with military units; they maintain that they would have scored higher had the tests been more convenient. The problem with this view is that §4311 is an anti-discrimination rule—its caption reads "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited". See *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 17 (1st Cir. 2007); *Miller v. Indianapolis*, 281 F.3d 648, 650–51 (7th Cir. 2002). Sandoval and Pennix were not turned away because they were on active duty; to the contrary, Chicago arranged for each to take the test outside the United States. Section 4311(a) requires Chicago to treat persons on military service the same as other employees, which it did. If plaintiffs had been on vacation, or on leave to attend college abroad, they would have been treated exactly as they were. So where is the discrimination?

What Sandoval and Pennix want is not the same treatment as everyone else (an anti-discrimination norm), but *better* treatment than those who are attending college or otherwise outside Chicago when a test is offered. In other words, they seek an

accommodation rather than equal treatment. But §4311 does not require accommodation, which is fundamentally different from an equal-treatment norm. See *University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Employment Division v. Smith*, 494 U.S. 872 (1990).

The opportunity to take a test that is required for promotion is a "benefit of employment" that Chicago may not deny to persons in the armed services. Because Chicago extended that opportunity to Sandoval and Pennix on the same terms available to persons not in military service, it complied with its obligations under §4311(a). Congress is free to require employers to do more—and perhaps Chicago would have done more voluntarily had Sandoval or Pennix asked for on-base administration of the test—but the statute on the books forbids discrimination without requiring accommodation. Another section of the Act drives home the point by requiring employers to treat persons on leave for military service the same as persons who are on leave for other reasons. 38 U.S.C. §4316. A requirement of equal treatment is incompatible with a demand for preferential treatment. See *Tully v. Department of Justice*, 481 F.3d 1367, 1369–70 (Fed. Cir. 2007); *Rogers v. San Antonio*, 392 F.3d 758, 764 (5th Cir. 2004).

Plaintiffs do not give any thought to the costs that their (belated) request for on-base administration would have imposed on Chicago and the military. When requiring accommodation, Congress usually sets limits on the expense and inconvenience that an employer must bear to provide that benefit. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (discussing the accommodation-of-religion

clause in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e–2(a)(1)); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (discussing the accommodation requirement in the Americans with Disabilities Act, 42 U.S.C. §12112(b)(5)(A)). Section 4311(a) does not set a cap on cost, however, because it does not require accommodation in the first place.

Plaintiffs' remaining arguments have been considered but do not require discussion. The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

March 30, 2009

BEFORE:

FRANK H. EASTERBROOK, Chief Judge
MICHAEL S. KANNE, Circuit Judge
TERENCE T. EVANS, Circuit Judge

No.: 08-2699	JUAN SANDOVAL, and SIDNEY PENNIX, On behalf of themselves and all others similarly situated, Plaintiffs - Appellants v. CITY OF CHICAGO, Defendant - Appellee

Originating Case Information:
District Court No: 1:07-cv-02835 Northern District of Illinois, Eastern Division District Judge Suzanne B. Conlon

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 C 2835

[Filed June 13, 2008]

JUAN SANDOVAL, et al.,)
Plaintiffs,)
)
v.)
)
CITY OF CHICAGO,)
Defendant.)
)

Suzanne B. Conlon, Judge

MEMORANDUM OPINION AND ORDER

Juan Sandoval and Sidney Pennix (collectively, "plaintiffs") sue the City of Chicago ("the City"), alleging violations of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, and the Illinois Service Member's Employment Tenure Act ("ISMETA"), 330 ILCS § 60/1, *et seq.* Plaintiffs are Chicago police officers and members of the army reserve. They claim the City denied them reasonable accommodations to take promotional examinations

while they served on active military duty. The City moves for summary judgment. For the reasons stated below, the motion is granted.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 665 (7th Cir. 2007). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences in a light most favorable to the non-moving party, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). The movant has the burden of establishing there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant satisfies this burden, the non-movant must set forth specific facts supported by admissible evidence that establish a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Batish v. Cook County*, 241 F.3d 919, 926 (7th Cir. 2001). A party who bears the burden of proof may not rest on the pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial. *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 607 (7th Cir. 2005) (citation omitted).

II. BACKGROUND UNCONTESTED FACTS

Sandoval and Pennix are Chicago Police Department ("CPD") officers. Def. Facts ¶¶ 1, 4. Sandoval was hired in 1982 and was promoted to his current field training officer position on July 23, 2007. *Id.* ¶¶ 1, 21. Pennix was hired in 1999 and promoted to his current field training officer position on June 1, 2003. *Id.* ¶¶ 4, 19. Sandoval and Pennix informed the CPD they were members of the armed services before they were lured. *Id.* ¶¶ 3, 6.

A. The Field Training Officer Promotion Process

A field training officer is a first line supervisor for police recruits, selected from the rank of police officers who have had no prior CPD supervisory duties. *Id.* ¶ 14. The CPD issued a notice on April 12, 2002 announcing that it was accepting field training officer applications. *Id.* ¶¶ 12-13. Applicants who passed a written practical exam and received an acceptable evaluation in certain law enforcement subject areas were placed on a candidate eligibility list for the position. *Id.* ¶ 12. The notice stated that as vacancies occurred, members would be selected by seniority from the eligibility list to attend a required 4-week training program with approximately 30 others. *Id.* ¶¶ 13, 16. During the training, field training officer candidates do not perform any patrol duties. *Id.* ¶ 15.

Sandoval and Pennix took and passed the written practical field training officer exam on June 15, 2002, placing them on the 2002 eligibility list. *Id.* ¶ 18. Pennix, along with approximately 31 others, attended and completed the first training program (commencing

on May 12, 2003) based on the 2002 eligibility list. *Id.* ¶ 19. Pennix was promoted to his field training officer position on June 1, 2003. *Id.*

Sandoval was on military leave when subsequent training programs were scheduled in 2003 and 2005. *Id.* ¶¶ 19-20. There is no evidence that he requested make-up training sessions when he returned from military leave. He did, however, attend the training program on May 21, 2007, with 29 other candidates. *Id.* ¶ 21. He was promoted to his field training officer position effective June 16, 2007.

On February 8, 2008, Sandoval received and cashed a $14,406 check for field training officer retroactive pay from June 1, 2003, the date the class from the 2002 eligibility list was promoted. *Id.* ¶ 22. Because field training officers hold the career-service rank of police officer, a promotion does not result in a new seniority date for the promoted officer. *Id.*

B. The Police Sergeant Promotion Process

Sergeant promotions occur when the CPD determines there is an operational need and when there are budgeted vacancies. *Id.* ¶ 36. On January 10, 2006, the City announced the 2006 police sergeant examination. *Id.* ¶ 23. The examination consisted of three components: (1) a written qualifying test; (2) an assessment exercise; and (3) a merit selection process. *Id.* Sandoval and Pennix were among 5,452 police officers who applied to take the 2006 sergeant examination. *Id.*

The written qualifying test was administered to all applicants on the same day, March 25, 2006. *Id.* ¶ 24.

No reschedules were permitted for the test. *Id.* There is no evidence that anyone requested a rescheduling of the test. On the test date, Sandoval was on military leave of absence in El Salvador. *Id.* ¶ 25. Sandoval submitted a written request to the CPD for an accommodation to take the test at a testing site off the military base where he was stationed. The request stated:

> 1. My name is Juan Sandoval, star number 12490, and employee number 48610.
>
> 2. I am presently in the Amy Reserves and on active duty at this time in El Salvador. I have been called up on active duty since 09 Mar 06 and will be here for several months in support of a mission.
>
> 3. I have registered for the SGT exam and am requesting off site accommodations for the SGT's test.
>
> 4. My commander here at the base camp concurs with my having to go off base to a site for testing. This should not be a hindrance on my activities for the test.
>
> 5. I can be reached at e-mail, juan.sandoval@us. my.mil or Cell 011 757 338 0957. Task Force El Salvador New Horizons 2006.

Id. at Ex. N. The request was approved. *Id.* ¶ 25. The CPD contacted Ernst & Young, the firm retained to administer the 2006 sergeant examination, to advise them that Sandoval's accomodation request was

approved. *Id.* Sandoval took the test at the Ernst & Young office in San Salvador, El Salvador, which was the closest office to the military base where he was stationed. *Id.* He did not recommend or request an alternative accommodation. *Id.* ¶ 39.

Pennix also submitted a written request to take the 2006 sergeant examination overseas because he was on a military leave of absence in Baghdad, Iraq. *Id.* ¶ 26. His request provided the following:

> R/O [Pennix] is presently deployed overseas in Baghdad, Iraq. R/O has registered on-line for the sergeant's exam. R/O is requesting to take the exam overseas because of the inability to return to the U.S. R/O has moved to a different location than the address provided during test registration. Below is contact information for R/O. Because there is very little time before the test, please use email or phone to contact R/O.

Id. at Ex. N. The request was approved, allowing Pennix to take the test at the Ernst & Young office in Frankfurt, Germany, which was the closest office to the military base where he was stationed. *Id.* ¶ 26. He testified he should have been allowed to take the written qualifying test when he returned to Chicago, but he did not request such an accommodation, nor did he tell the CPD what he thought would be a reasonable accommodation. *Id.*

Sandoval and Pennix passed the written qualifying test, allowing them to continue in the 2006 sergeant examination process. *Id.* ¶ 27. Of the 4,050 applicants who took and passed the written qualifying test, 3,636, including Sandoval and Pennix, took the assessment

exercise. *Id.* ¶ 28. The assessment exercise was administered to all candidates on the same day, June 24, 2006, and no reschedules were allowed. *Id.* ¶ 29. Sandoval took the assessment exercise in Chicago. *Id.* ¶ 30. Pennix was on military leave of absence at the time in Baghdad, so he took the assessment exercise at the Ernst & Young office in Frankfurt. *Id* He testified he should have been allowed to take the assessment exercise when he returned to Chicago, but he never requested such an accommodation nor did he tell the CPD what he thought would be a reasonable accommodation. *Id.* ¶ 40.

Based on their assessment exercise scores and continuous service dates, Sandoval is rated 1,110 and Pennix 1,955 on the assessment exercise eligibility list. *Id.* ¶ 31. Approximately 70% of the sergeant promotions will be made in rank order from this list. *Id.*

The 4,050 applicants who passed the written qualifying test, including Sandoval and Pennix, are on the merit selection eligibility list. Approximately 30% of the sergeant promotions will be made from this unranked list. *Id.* ¶ 32. Those promoted from this list are chosen because they have demonstrated exemplary job-related skills, abilities and personal characteristics. *Id.* ¶ 33. The police superintendent selects promoted applicants. *Id.* Applicants on a military leave of absence are considered in the merit promotion process. *Id.* ¶ 35.

One merit nomination process has occurred to date based on the results of the 2006 sergeant examination. *Id.* ¶ 37. The applicant promoted from the assessment exercise eligibility list was ranked 40. *Id.* All promoted

applicants had to be on full duty and on active status with the CPD on July 30, 2007, when they were ordered to report for pre-service sergeant training. *Id.* Sandoval and Pennix, who were not on military leave of absence, were not selected for promotion to sergeant in the first round. *Id.* Sandoval and Pennix remain eligible for promotion to sergeant from both the assessment exercise eligibility list and the merit selection eligibility list. *Id.* ¶ 38.

III. DISCUSSION

A. USERRA Discrimination

The USERRA prohibits discrimination that denies any benefit of employment on the basis of an employee's membership in the uniformed services. 38 U.S.C. § 4311(a); *Miller v. City of Indianapolis,* 281 F.3d 648, 650 (7th Cir. 2002). A benefit of employment is broadly defined to include:

> any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

28 U.S.C. § 4303(2).[1]

Under USERRA, Sandoval and Pennix bear the initial burden of showing by a preponderance of the evidence that their military service was "a substantial or motivating factor" in the denial of an employment benefit. *Velazquez-Garcia v. Horizon Lines Of Puerto Rico*, Inc., 473 F.3d 11, 16-17 (1st Cir. 2007); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir.2002); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 (9th Cir. 2002); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir.2001); *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo v. Vill. of Depew, N.Y.*, 75 F.3d 98, 106 (2d Cir. 1996); *see also Miller v. City of Indianapolis*, No. 99 C 1735, 2001 WL 406346 (S.D. Ind. April 13, 2001), *aff'd*, 281 F.3d 648 (7th Cir. 2002).

A motivating factor is not necessarily the sole cause of the action, but rather it is one of the factors that a truthful employer would list if asked for the reasons for its decision. *Coffman*, 411 F.3d at 1238-39. Military status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration. *Fink v. City of New York*, 129 F. Supp. 2d 511, 520 (E.D.N.Y.2001) (citation omitted).

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[1] Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries. *McGuire v. United Parcel Service*, 152 F.3d 673, 676 (7th Cir. 1998).

Discriminatory motivation is a factual question that may be proven through direct or circumstantial evidence, including but not limited to:

> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.

Sheehan, 240 F.3d at 1014; *Coffman*, 411 F.3d at 1238.

If Sandoval and Pennix demonstrate discriminatory motivation, the burden shifts to the City to prove that legitimate reasons, standing alone, would have induced the City to take the same adverse action. *Sheehan*, 240 F.3d at 1014; *Gummo*, 75 F.3d at 106. This framework is the two-pronged burden-shifting analysis of *NLRB v. Transportation Management Corp.*, 462 US. 393, 103 S.Ct. 2469,76 L.Ed.2d 667 (1983). It is distinct from the three-pronged *McDonnell Douglas* framework used in Title VII suits. Under the latter test, the burden of persuasion always remains on the employee. Once a case of discrimination is established by the employee, the employer must only put forward "some legitimate, non-discriminatory reason" for its action. *McDonnell Douglas Corp. v. Green*, 411, U.S. 792, 802 (1973). The burden is then on the employee to prove that the employer's reason is a pretext for its true motives. *See Velazquez-Garcia*, 473 F.3d at 17. Under the *NLRB* framework, the

burden of persuasion shifts to the employer. "The burden of proof cast upon the employer to explain the discrimination is procedurally greater under the *NLRB* test." *Fink*, 129 F. Supp. 2d at 520.

USERRA is violated when an employer denies a benefit of employment to an employee if the employee's membership, application for membership, service, application for service, or obligation for service in the military is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of military service. *Sheehan*, 240 F.3d at 1014; *Gummo*, 75 F.3d at 106.

B. ISMETA

Under the ISMETA, individuals returning from military service are protected from being denied re-employment to a position "with the same increases in status, seniority and wages that were earned during . . . [the] military service [term] by employees in like positions who were on the job at the time such returning serviceman entered the service, or to a position of like seniority, status and pay, unless such employer's circumstances have so changed as to make it impossible or unreasonable to do so." 330 ILCS § 60/4. ISMETA is therefore violated when an employer fails to re-employ a returning serviceman to a position that is credited the same (or similar) status, seniority, and wage increases enjoyed by those who did not leave for military service.

C. Sandoval's claims

1. Failure to Promote to Field Training Officer in 2003

Sandoval claims he was denied a field training officer promotion in 2003 because the City discriminated against him for serving in the army. It is undisputed that Sandoval was promoted to his current field training officer position in 2007. After his promotion, he was retroactively paid as if he had been promoted with the 2003 training class.

Sandoval bears the initial burden of showing that his military service was a substantial or motivating factor for denying him a field training officer promotion in 2003. *Sheehan*, 240 F.3d at 1014. The CPD requires that in order to be promoted to the position, an officer must attend a four-week training program after passing a written exam. The record establishes Sandoval was unable to attend a training session in 2003 because he was on military leave. The issue is whether Sandoval's military service was a substantial or motivating factor for the City's requirement that Sandoval participate in training prior to promotion.

The City argues there are no facts to support this contention. Indeed, Sandoval identifies no evidence whatsoever sufficient to make a *prima facie* showing of discriminatory motivation. Even if Sandoval were able to establish discriminatory motivation, summary judgment is still warranted because the City has presented evidence that establishes the affirmative defense it would have denied Sandoval's promotion in 2003 regardless of his military status. Sandoval simply

did not possess the CPD requirements for a promotion required of all candidates, military and non-military in 2003. The CPD required that those who pass the written field training officer exam attend a four-week training program prior to promotion. When Sandoval completed the May 2007 training program, he was duly promoted.

Sandoval argues the City should have offered other training dates while he was on leave or upon his return in 2004. But he does not cite any evidence that he made that request or that the CPD denied such a request. *Compare Fink*, 129 F. Supp. at 518 (failure to accommodate to take a promotional exam may constitute discrimination where veteran requests to take a make-up exam upon return from service).

Further undermining Sandoval's claim is the undisputed fact that he was retroactively paid from June 1, 2003, the promotion date of successful candidates from the 2003 training class. This moots any assertion that Sandoval was denied the benefits he would have received had he been promoted to field training officer in 2003. *See, e.g., Woodard v. New York Health and Hospitals Corp.*, ---- F. Supp. 2d ----, 2008 WL 728887, at *20 (E.D.N.Y. Mar. 17, 2008) (retroactive pay increase resulted mooted USERRA injury). Summary judgment must be granted with respect to Sandoval's failure to promote claim in 2003.[2]

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[2] Sandoval's argument that the retroactive payment warrants a summary judgment *in his favor* is unavailing, as the request is not properly before the court in his own summary judgment motion.

2. Failure to Provide Reasonable Accommodation to Take the 2006 Sergeant Examination

Sandoval claims the City violated the USERRA by not providing him a reasonable accommodation to take the written qualifying test portion of the 2006 sergeant examination while he was on military leave in El Salvador. The City contends that summary judgment is warranted because the undisputed facts show Sandoval was reasonably accommodated. Sandoval disputes this because there is evidence he took the test at a location that required him to pass through hostile territory and risk his life.

As an initial matter, the court must first determine whether a reasonable accommodation to take a promotion exam constitutes an employment benefit under USERRA. Given the broad construction of a "benefit of employment," *see* 38 U.S.C. § 4303(2), a reasonable accommodation to take a promotion exam in another location may constitute an employment benefit under USERRA. *Cf. Fink,* 129 F. Supp. 2d at 520 (refusal to grant request for a promptly administered promotional exam may be construed as a denial of benefit of employment). Construing the undisputed facts in Sandoval's favor, a genuine issue of fact precludes the court from granting summary judgment on this ground.

Nevertheless, Sandoval has the initial burden of demonstrating that the City's *unreasonable* accommodation for the written qualifying test was

motivated by his military service.[3] Apart from evidence that the accommodation decision was made because Sandoval was on military leave, there is no evidence showing discriminatory motivation. To the contrary, the record shows that the City *granted* Sandoval's accommodation request by providing him an overseas, off-base test location site. Sandoval never objected to the accommodation he was given, nor did he request a more tailored accommodation. *Compare Fink,* 129 F. Supp. at 518 (failure to accommodate to take a promotional exam may constitute discrimination where veteran requests to take a make-up exam upon return from service). Significantly, there is no evidence to support an inference that the City had an incentive to give him an unreasonable accommodation because he was in the military. The only evidence in Sandoval's favor is that the City knew he was in the armed forces and that he was on military leave. This evidence is insufficient to sustain Sandoval's burden of showing discriminatory motivation. *Cf. Young v. Dep't of Army,* 115 Fed. Appx. 63, at *2 (Fed. Cir. 2004) (fact that an employer knows a person is a veteran is insufficient in itself to make out a USERRA claim).

Sandoval's insistence that a factual issue remains with respect to the reasonableness of the accommodation does not change this analysis. Even if the accommodation was unreasonable and Sandoval had to wade through hostile territory, there is nothing in the record showing that the City made the decision because Sandoval served in the military.

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[3] Sandoval does not contest that he was given an accommodation to take the exam. Rather, he contends that the accommodation was unreasonable.

Sandoval's alternative assertion that there is evidence his written qualifying test could have been administered by a military officer (rather than at an off-base Ernst & Young location) is irrelevant to the discriminatory motivation analysis.[4] Even if Sandoval's exam could have been administered by a military officer, this does not show that the City unreasonably accommodated him due to his military service. Sandoval expressly requested an *off-base* accommodation, not an accommodation to have the test administered by a military officer. The testimony Sandoval cites does not indicate whether his written qualifying test could have been administered by a military officer. The testimony cited constitutes inadmissible hearsay. The deponent did not have personal knowledge of whether a promotional exam was administered outside Chicago to a sworn officer on military duty. *See* Lewandowski Dep., p. 64:3-10; *see also* Fed. R. Evid. 801-02; *Hemsworth v. Quotesmith .com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007) (evidence relied upon in defending a summary judgment motion must be admissible at trial).

Sandoval offers nothing but his own speculation to establish a nexus between his military status and the reasonableness of the accommodation he was given. Therefore, he has not established a *prima facie* USERRA discrimination claim based on the

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[4] Sandoval cites CPD Sergeant Kenneth Lewandowski's testimony that, "[c]urrently on Saturday, 23rd [of February 2008], the personnel division of the CPD made arrangements for an officer who's in military training to take the test at a different location . . . our personnel department approached me to get a copy of the test so they can FedEx it to his commanding officer." Pls. Facts ¶ 2 at Ex. D.

reasonableness of his testing accommodation. *See, e.g., Coffman*, 411 F.3d at 1238 (employee's military status was not a motivating factor in corporation's decision not to hire him); *Sanguinetti v. United Parcel Service, Inc.*, 114 F. Supp. 2d 1313 (S.D. Fla. 2000) (no *prima facie* showing that termination was due to military service); *Martin v. AutoZone, Inc.*, 411 F. Supp. 2d 872, 880 (S.D. Ohio 2005) (no evidence that plaintiff was not promoted because of military status); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529, 533 (W.D. Mich. 1997) (same).

Even assuming Sandoval could satisfy his initial burden of showing discriminatory motivation, the City has identified undisputed evidence showing that it would have made the same accommodation regardless of Sandoval's military status. The pertinent fact here is that the City granted Sandoval exactly what he requested – an accommodation overseas. Sandoval cites no evidence that would counter this material fact or show that he objected to the accommodation. There is no dispute that the City would have made the same decision if a non-military applicant on leave made an identical request. Summary judgment is proper. *See, e.g., Clune v. Desmond's Formal Wear, Inc.*, No 01 C 606, 2003 WL 21796388, at *8-9 (N.D. Ind. Feb. 4, 2003) (plaintiff failed to provide evidence of discriminatory motivation and defendant showed that same adverse decision would have been made absent military status); *Hart v. Hillside Township*, No. 03 C 5841, 2006 WL 756000, at *13 (D.N.J. Mar. 17, 2006) (same); *Coffman*, 411, F.3d at 1239 (same).

3. ISMETA Claim

The City argues it is undisputed that Sandoval was restored to his CPD position with the same increase in status, seniority and wages earned by employees in similar positions while he was on military leave. Indeed, the fact that Sandoval became a field training officer in 2007 does not alter this conclusion, because it is undisputed that field training officers hold the career-service rank of police officer. Sandoval does not dispute this characterization, arguing that the only disputed issue is whether the City reasonably accommodated his request to take his written qualifying test for a sergeant promotion while he was on military leave. Accordingly, summary judgment is granted with respect to Sandoval's ISMETA claim.

D. Pennix's claims

1. Failure to Provide Reasonable Accommodation to Take the 2006 Sergeant Examination

Pennix also claims the City violated USERRA by failing to provide him a reasonable accommodation to take the written qualifying exam or the assessment exercise of the 2006 sergeant examination. Like Sandoval, his claim fails because he has not made a *prima facie* showing that the City's test accommodation was motivated by his military service.

The undisputed facts show that while Pennix was in Iraq, he submitted a written request for an accommodation to take the promotional written qualifying test overseas. This request was approved, and the test was administered at the closest Ernst &

Young office in Frankfurt, Germany. There is no evidence that the City had any knowledge that Pennix would have to go through hostile territory to take the exam. Nor is there any evidence that Pennix objected to his accommodation or requested another accommodation. *Compare Fink*, 129 F. Supp. at 518 (failure to accommodate to take a promotional exam may constitute discrimination where veteran requests to take a make-up exam upon return from service). Viewing these facts in Pennix's favor, there is no reasonable inference that the City gave Sandoval an unreasonable accommodation *because* of his military service.

Assuming Pennix could satisfy his burden of showing that military service was a substantial or motivating factor for the City's decision to give him an unreasonable accommodation, summary judgment is still warranted. The City has presented undisputed evidence establishing the affirmative defense that it would have made the same accommodation regardless of Sandoval's military status. Pennix never requested an alternative accomodation than the one he was given. Nor was he denied an accomodation altogether. There is no evidence the City knew or should have known that its accommodation was unreasonable. Nor is there any evidence the City would have responded differently to a non-military person's identical request. Accordingly, summary judgment is warranted on Pennix's reasonable accommodation claim.

2. ISMETA claim

Similar to Sandoval, Pennix does not dispute that he was restored to the same increases in status, seniority and wages earned by employees in like

positions while he served in the military. He argues the only disputed issue is whether the City provided reasonable accommodation for him to take the 2006 sergeant examination while on military leave. Summary judgment is granted with respect to his ISMETA claim.

E. Remaining Claims

The City moves for summary judgment on claims that Sandoval and Pennix suggestively raised in their depositions. Sandoval and Pennix concede they do not raise those claims in their complaint. The court will therefore not address unpreserved claims.

IV. CONCLUSION

The City has established that the undisputed facts preclude Sandoval and Pennix from establishing *prima facie* USERRA and ISMETA claims. Accordingly, the City's summary judgment motion is granted.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

June 13, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 07 C 2835

[Filed June 13, 2008]

JUAN SANDOVAL,	)
SIDNEY PENNIX,	)
	)
v.	)
	)
CITY OF CHICAGO,	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered for defendant City of Chicago and against plaintiffs Juan Sandoval and Sidney Pennix.

Michael W. Dobbins, Clerk of Court

sbe

/s/ Willia Harmon, Deputy Clerk

Date: 6/13/2008

APPENDIX C

LAW OFFICE OF RUTH MASTERS
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March 31, 2009

Hon. Frank H. Easterbrook
United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street, 27th Floor
Chicago, IL 60604

RE: Sandoval et al. City of Chicago, No. 08-2699

Dear Judge Easterbrook:

We wish to apprise the court of a concern we have with respect to the opinion issued in this case on March 30, 2009.

The opinion states that "[i]f plaintiffs had been on vacation, or on leave to attend college abroad, they would have been treated exactly as they were," slip op. 3, and "[b]ecause Chicago extended that opportunity [to take the sergeants promotional exam] to Sandoval and Pennix on the same terms available to persons not in military service, it complied with its obligations under § 4311(a)," id. at 4.

As we explained in our brief, plaintiffs' USERRA claims failed for two major reasons. First, as the court holds, the statute prohibits discrimination but does not require reasonable accommodation. Second, and relevant here, plaintiffs adduced no evidence of discrimination -- adverse employment action or discriminatory motive. To the contrary, as we highlight throughout our brief, plaintiffs were allowed to take their exam outside of Chicago when there was no evidence that those on leave for other reasons were allowed to do so. On this record, then, it cannot be said that the City treated plaintiffs the same as other employees. Rather, the City treated plaintiffs better than those on leave for non-military reasons.

The statements by the court that we quote above do not reflect this. While the statements do not undermine the disposition, the court may which to correct the impression that these statements may otherwise give a reader of the opinion.

Very truly yours,

/s/ Ruth F. Masters /BRS
Ruth F. Masters

cc: Hon. Terrence T. Evans
Hon. Michael S. Kanne
Thomas C. Cronin
James V. Capparelli